

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK MALLOY,

Plaintiff-Appellant,

v

DSI ACOUSTICAL COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 29, 2008

No. 277495

Ingham Circuit Court

LC No. 06-000543-NZ

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition on plaintiff's claim of worker's compensation retaliation. MCL 418.301(11). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked as a plasterer for defendant from July 31, 2003 to November 11, 2003. While plaintiff knew that there were no guarantees for work, and that layoffs were common when there was a slowdown in work opportunities, he testified that he was led to believe that defendant had plenty of work so he and others possibly could work through the entire winter off-season.

On October 3, 2003, plaintiff injured his right arm while working for defendant. Plaintiff claims the supervisor asked him to go to a doctor on his personal medical insurance policy. But plaintiff refused, believing that was not the proper procedure for a work-related injury.

On October 13, 2003, ten days after the injury, plaintiff went to Delta Medical Center after defendant's owner, Dennis Stiffler, instructed him to do so. Plaintiff did not pay for the Delta Medical Center visit. Plaintiff was placed on work restrictions after seeing the doctor at Delta, and had follow-up visits on November 3 and November 6. Plaintiff was authorized to return to work without restrictions following the November 6, 2003 appointment.

After his restrictions were removed, plaintiff worked a couple more days until the job he was on was basically completed. He then waited to get called back and sent to another job. Plaintiff spoke to the supervisor two or three days later and was then told he was laid off. Plaintiff's last day of work for defendant was November 11, 2003. Plaintiff believed he was laid

off because he asserted his rights for medical treatment under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*

The trial court granted defendant's motion for summary disposition, holding that plaintiff did not establish a *prima facie* case for retaliatory discharge because a causal connection did not exist between his seeking medical attention under the WDCA and his layoff.

A trial court's decision to grant a motion for summary disposition is reviewed *de novo*. *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, we consider pleadings, affidavits, depositions, admissions, and other documentary evidence. In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id.* (Internal citations omitted).]

The WDCA prevents retaliation against workers who exercise a right allowed by the WDCA. Under MCL 418.301(11), an employer shall not

discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under [the WDCA] or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by [the WDCA].

Plaintiff bears the burden of showing a causal connection between the protected activity of exercising a right under the WDCA and the adverse employment action. *Chiles v Machine Shop, Inc.*, 238 Mich App 462, 470; 606 NW2d 398 (1999). Plaintiff's burden is to prove the following four elements: that "(1) he asserted his right for worker's compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." *Id.*

In the present case, there is no dispute that plaintiff asserted his rights under the WDCA when he saw a doctor at Delta Medical Center concerning the injury to his right arm. There is also no dispute that defendant laid off plaintiff and did not call him back to work after November 11, 2003. Defendant's stated reason for its actions was that a seasonal downturn of work opportunities caused plaintiff and others to be laid off or not replaced after otherwise leaving defendant's employment. Defendant provided employment records to the trial court showing that five employees stopped working for defendant from September to November 2003, and that defendant did not rehire any of them until March and April 2004.

As to the third and fourth elements, plaintiff has not submitted any evidence that refutes, or otherwise places into doubt, defendant's legitimate, non-discrimination reason for laying him off. Defendant provided specific names and dates of similar workers who were laid off or otherwise left defendant's employ during this same time period. Yet plaintiff only offers vague, generalized assertions that all the workers remained on the job after he left. This does not create a triable issue of fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).¹

Plaintiff's beliefs of retaliation and his testimony as a whole did not show that defendant's reason for laying off plaintiff, which was supported by the employment records, was a pretext for retaliatory discharge. Plaintiff has not presented documentary evidence establishing the existence of a material factual dispute concerning elements three and four of his retaliation claim. Accordingly, plaintiff has not shown a causal connection between asserting his rights under the WDCA and defendant's adverse employment action.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering

¹ At his deposition plaintiff acknowledged that it was common to lay people off when there was a slowdown in work, and that despite his understanding that defendant had plenty of work lined up for the winter months, defendant made no promises that plaintiff would work a certain amount of time. Additionally, plaintiff testified that after getting laid off he was too busy looking for other work to be worried about who was still working for defendant.